

## FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

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**MEMORANDUM OPINION**

GÓMEZ, C.J.

Before the Court is the motion of defendant Shawn Tyson for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On July 31, 2008, Tyson, a private second class in the

Tennessee National Guard, arrived at the Tri-Cities Regional Airport in northeastern Tennessee in preparation for a flight to St. Thomas, U.S. Virgin Islands. Before boarding his flight, Tyson declared several firearms to airline employees. On arrival in St. Thomas, Tyson was met by his co-defendant, Kelroy Morrell, who had come to the airport by car. An individual named Curtiss Thomas was also in Morrell's car.

Unbeknownst to Tyson, federal law enforcement agents had obtained a search warrant during his flight after being alerted by authorities in Tennessee to the presence of firearms in Tyson's luggage and determining that Tyson did not have a federal firearms license.

While law enforcement agents at the airport on St. Thomas watched from a distance, Tyson retrieved his luggage from a baggage carousel and left the baggage claim area. He placed his luggage in the trunk of Morrell's car and entered the car. The car then proceeded to the airport exit. Within moments of the car's departure from the airport, law enforcement agents stopped it and arrested Tyson and Morrell.<sup>1</sup>

After Tyson and Morrell were taken into custody, the agents

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<sup>1</sup> Curtiss Thomas was also arrested and separately indicted on several firearms-related charges. At the conclusion of a trial in this Court, a jury acquitted Thomas.

obtained Morrell's written consent to search his car and discovered several firearms and ammunition inside. Law enforcement agents later searched Tyson's computer, camera and cellular telephone, discovering various images of Tyson and other individuals discharging and posing with firearms.

In October 2008, Tyson and Morrell were indicted on a total of twenty-seven counts between them. Tyson was charged with one count of conspiracy to traffic firearms in violation of 18 U.S.C. § 371; twelve counts of trafficking firearms in interstate and foreign commerce in violation of 18 U.S.C. § 922(a)(1)(A); eleven counts of unauthorized possession of a firearm in violation of V.I. CODE ANN. tit. 14, § 2253(a); one count of transferring a firearm to be used in a crime in violation of 18 U.S.C. § 924(b); and one count of transferring firearms to an out-of-state resident in violation of 18 U.S.C. § 922(a)(5) and 18 U.S.C. § 924(a)(1)(D).

A three-day trial was held in January 2009. At the close of the government's case-in-chief, Tyson moved for relief pursuant to Federal Rule of Criminal Procedure 29. The Court took the motion under advisement.<sup>2</sup> On the third day of trial, the jury found Tyson guilty on all charges save for one count of

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<sup>2</sup> The Court has not ruled on that motion.

unauthorized possession of a firearm.<sup>3</sup>

Tyson now renews his motion for a judgment of acquittal on all charges on which he was found guilty pursuant to Rule 29.<sup>4</sup>

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<sup>3</sup> The jury acquitted Morrell of all charges.

<sup>4</sup> After the jury returned its verdict on January 16, 2009, Tyson, with no objection from the government, asked for an extension of time to file post-trial motions. The Court granted that motion and allotted Tyson thirty days from the date of his transcript request to file post-trial motions. Tyson filed his transcript request on January 28, 2009. The transcript was filed on March 10, 2009. On April 13, 2009, Tyson filed his Rule 29 motion, well after the thirty days from the transcript request allotted by the Court. The Court recognizes that the transcript was not filed until after the thirty-day period had expired. The responsibility for seeking more time to file post-trial motions, however, lay squarely on Tyson's shoulders. The record does not reflect that he sought additional time. As such, Tyson's renewed Rule 29 motion is clearly untimely. That untimeliness is not necessarily a bar to its consideration, however, as the Supreme Court has made clear that the time limits imposed by Rule 29, while rigid and mandatory, are not jurisdictional. See *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (stating that Rule 29 "is a claim-processing rule -- one that is admittedly inflexible because of Rule 45(b)'s insistent demand for a definite end to proceedings").

In *Eberhart*, the Court clarified that given Rule 29's non-jurisdictional nature, the untimeliness of a motion brought under that rule is subject to waiver or forfeiture by the opposing party. See *id.* Here, the government has not, in either its initial opposition or supplemental opposition papers, raised the issue of the untimeliness of Tyson's motion, and thus has forfeited its right to object. See, e.g., *United States v. Hope*, 487 F.3d 224, 227 n.6 (5th Cir. 2007) ("[T]he government failed to preserve a timeliness objection [to the defendant's Rule 29 motion]; accordingly, we consider this argument forfeited."); *United States v. Robinson*, 430 F.3d 537, 542 (2d Cir. 2005) ("[T]he government forfeited its objection to the untimeliness of Robinson's motion by failing to raise the objection in a timely fashion and not raising the issue until after the court had granted Robinson's motion for a new trial" (footnote omitted)).

The government opposes the motion on the merits.<sup>5</sup>

## II. DISCUSSION

In ruling on a motion for a judgment of acquittal made pursuant to Federal Rule of Criminal Procedure 29, a district court must "review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)); *see also United States v. Jannotti*, 673 F.2d 578, 598 (3d Cir. 1982) (en banc). An insufficiency finding should be "confined to cases where the prosecution's failure is clear." *Smith*, 294 F.3d at 477 (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984)). "Courts must be ever vigilant in the context of [Rule] 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (citations omitted); *see also United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984)

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<sup>5</sup> After the parties submitted briefs, the Court ordered supplemental briefs. The government timely filed its supplemental brief. Tyson filed his supplemental brief out of time. He never asked for or received permission to do so. The day after the briefs were due, Tyson submitted an "amended" motion for a judgment of acquittal.

("Our task is not to decide what we would conclude had we been the finders of fact; instead, we are limited to determining whether the conclusion chosen by the factfinders was permissible.").

### **III. ANALYSIS**

Tyson does not explicitly argue that the government failed to meet its burden of proof with respect to every element of each count on which he was convicted. He merely contends, in conclusory fashion, that "no rational juror could find him guilty of the offense[s] charge[d]." (Def. Tyson's Mem. Supp. Rule 29 at 1.)

#### **A. Count One: Conspiracy to Traffic Firearms**

Count One of the indictment charged Tyson with conspiracy to traffic firearms in violation of 18 U.S.C. § 371. To sustain Tyson's conviction on that count, the record must contain sufficient evidence that: (1) there was an agreement between two or more persons to traffic firearms; (2) Tyson knowingly joined the agreement; and (3) one of the conspirators committed an overt act in furtherance of the conspiracy. *See United States v. Gebbie*, 294 F.3d 540, 544 (3d Cir. 2002) (citing *United States v. Conley*, 37 F.3d 970, 976-77 (3d Cir. 1994)).

Although a court must pay "close scrutiny" to the government's evidence in conspiracy cases, *United States v.*

*Coleman*, 811 F.2d 804, 807 (3d Cir. 1987), each element of conspiracy may "be proven entirely by circumstantial evidence," *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005) (citations omitted). Furthermore, while "slight evidence of a defendant's connection with a conspiracy is insufficient to support a guilty verdict," *Coleman*, 811 F.2d at 807 (quoting *United States v. Allard*, 240 F.2d 840, 841 (3d Cir. 1957)), the proper inquiry is whether "all the pieces of evidence, taken together, make a strong enough case to let a jury find the defendant guilty beyond a reasonable doubt." *Brodie*, 403 F.3d at 134 (alteration, quotation marks and citations omitted). Proof that the objective of the conspiracy has been completed is unnecessary for conspiracy liability to attach. See *United States v. Conley*, 37 F.3d 970, 981 n.15 (3d Cir. 1994); *United States v. Uzzolino*, 651 F.2d 207, 214 n.13 (3d Cir. 1981) (stating that "jury could properly have found appellee guilty of conspiracy without finding that he had committed substantive violations in furtherance of that conspiracy").

The government's evidence of conspiracy is as follows. Several Tennessee-based, federally licensed firearms dealers testified that Tyson purchased various firearms from them over a several-month period. (Trial Tr. vol. 1, 265-68, 275-77, Jan. 14, 2009; vol. 2, 9-11, 21-24, 34-35, 74-77, Jan. 15, 2009.) All

told, Tyson purchased thirty-five firearms from December 2007 until July 2008. (*Id.* at vol. 2, 310.) Of those thirty-five firearms, law enforcement officials recovered only twelve. (*Id.*)

On February 14, 2008, Chesney Griffin, a Bristol Tennessee Police Department officer, responded to a 911 call about gunfire at a residence located at 348 Rosedale Lane in Bristol, Tennessee. (*Id.* at vol. 1, 41-42.) Tyson, Morrell and an individual named Sherry Wagner were all found inside the residence. A search of the residence revealed the presence of several firearms, firearm boxes, receipts for firearm purchases and ammunition magazines. (*Id.* at vol. 1, 59, 65-68.)

Bob De Lugo, a Delta Air Lines station manager for St. Thomas and St. Croix, U.S. Virgin Islands, testified that Tyson traveled on various occasions from Tennessee to the Virgin Islands. (*E.g.*, *id.* at vol. 1, 168-72.) On at least two of those occasions -- on February 20, 2008 and July 31, 2008 -- Tyson traveled with firearms. (*Id.* at vol. 1, 204-06, 210-16.) Tyson told airline personnel that he had buyers for his firearms in the Virgin Islands. (*Id.* at vol. 1, 227-28.) On at least one occasion, Tyson traveled with Morrell, both of whom were found to be carrying luggage with firearms inside. (*Id.* at vol. 1, 217-18, 221.)

Morrell testified that Tyson and he on one occasion went

together in Sherry Wagner's car to a firearms store in Tennessee. Morrell testified about videotaping the area around the store and identified Tyson inside the store in an image taken from that videotape. (*Id.* at vol. 2, 470-71.) When asked whether he had purchased firearms or whether there were firearms in the car that day, Morrell responded in the negative. (*Id.* at vol. 2, 472.) When the government showed Morrell other images and asked whether they exhibited the presence of firearms in Wagner's car that day, Morrell responded in the affirmative. (*Id.* at vol. 2, 472-73.)

The government also presented unrefuted testimony that Tyson traveled to the Virgin Islands on July 31, 2008 with luggage that was full of firearms. (E.g., *id.* at vol. 1, 233; vol. 2, 41, 51). Elfreda Robinson, the supervisor of the Virgin Islands Police Department's ("VIPD") Firearms Bureau for the District of St. Thomas/St. John/Water Island, answered "no" when asked on direct examination whether Tyson had registered any firearms in the Virgin Islands. (*Id.* at vol. 2, 269.) On arrival at the airport in St. Thomas, Tyson met Morrell and Curtiss Thomas, packed the firearms into Morrell's car, and left the airport with Morrell and Thomas.

The government also presented evidence that an individual named Jelani LaTorre wired \$330 to Tyson in Tennessee on January 31, 2008. (*Id.* at vol. 2, 307-08.) On June 30, 2008, Ludrick

Thomas, a supervisor with the Virgin Islands Police Department Traffic Bureau, stopped LaTorre for a traffic violation and found in his possession a firearm with an obliterated serial number. (*Id.* at vol. 2, 108-10.) The government elicited testimony that Tyson had previously purchased that firearm in Tennessee. (*Id.* at vol. 2, 308-09.)

In the Court's view, a reasonable jury viewing the evidence outlined above, taken as a whole, could not find that Tyson and at least one other person agreed to traffic firearms and took steps to achieve that objective.<sup>6</sup>

It is, of course, well-settled that an individual can be convicted of a conspiracy with unknown persons. See *United States*

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<sup>6</sup> In response to the Court's order for supplemental briefing, the government, with respect to Tyson's conspiracy conviction, had this to say:

The proof of the conspiracy overlaps with the proof for the substantive counts in the indictment. Therefore, the government will rely on the record excerpts raised in the sections cited below as support for upholding Count One of the indictment.

(Pl.'s Rule 29 Supp. Br. 1.)

It is axiomatic that "conspiracies and substantive offenses contain different elements[.]" *United States v. Watkins*, 339 F.3d 167, 177 (3d Cir. 2003); see also *United States v. Riviere*, 924 F.2d 1289, 1306 (3d Cir. 1991) (noting that "conspiracy and the substantive offense that was the sole object of the conspiracy . . . clearly require proof of different elements"). The government's position that it could rely on proof of some other crime to sustain Tyson's conspiracy conviction is not easily reconciled with that well-settled conspiracy principle.

*v. Obialo*, 23 F.3d 69, 72 (3d Cir. 1994) ("The failure of the government to be able to name and personally identify the other conspirator is not fatal to a conspiracy conviction."); *United States v. Allen*, 613 F.2d 1248, 1253 (3d Cir. 1980) ("'The identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.'") (quoting *Rogers v. United States*, 340 U.S. 367, 375 (1951)). There must, however, be evidence of the participation of at least one other person. See *Obialo*, 23 F.3d at 72; see also *Government of Virgin Islands v. Hoheb*, 777 F.2d 138 (3d Cir. 1985) (affirming a conspiracy conviction where the defendant repeatedly referred to the involvement of a third person in his conversations with a confidential informant).

The Third Circuit Court of Appeals has vacated conspiracy convictions where the government failed to adduce sufficient evidence of an agreement between the defendant and some other person, whether identified or unidentified, to commit an unlawful act.

In *United States v. Pressler*, 256 F.3d 144 (3d Cir. 2001), Daniel Pressler and Scott Shreffler were convicted of conspiracy to distribute heroin. Shreffler appealed his conviction on sufficiency-of-the-evidence grounds. The evidence at trial

showed that Shreffler distributed a large amount of heroin to many individuals on several occasions. Sometimes accompanied by his friends Anthony and Aaron Forshey, Shreffler obtained the heroin in Philadelphia, usually from Pedro Caban. The people to whom Shreffler sold heroin had other supply sources, including Pressler, and some of those people also sold heroin themselves.

While acknowledging that "Shreffler bought a large amount of heroin from Caban, and sold heroin to a large number of people," the Third Circuit noted that "a conspiracy requires an agreement to commit some other crime beyond the crime constituted by the agreement itself." *Id.* at 151 (quotation marks and citation omitted). The court first considered whether there was sufficient proof that Shreffler had conspired with Caban and the Forsheys, all of whom were named in the indictment:

Both Aaron and Anthony Forshey traveled with Shreffler to Philadelphia numerous times to acquire heroin, but both also often went without him. The Forsheys originally purchased heroin from street dealers, but Shreffler eventually introduced them to Caban, explaining that Caban offered a "safer" way to purchase the drug. Shreffler bragged to the Forsheys that his purchases from Caban were so sizeable that they were responsible for "taking [Pete] off the street" and allowing Caban to sell heroin directly out of his house.

*Id.* at 153 (quotation marks and alteration in original). The court found these facts insufficient to show an agreement between Shreffler and Caban to distribute heroin to the Forsheys, because

"all that the evidence showed was that Shreffler introduced the Forsheys to another, superior source of supply from which Shreffler himself had purchased a large amount of heroin." *Id.* The court likewise concluded that there was insufficient evidence to show that Shreffler conspired with the Forsheys. The court reasoned that "the fact that the Forsheys and Shreffler knew that they were involved in the same 'business' (in this case, the distribution of heroin) and that they obtained much of their supply from the same 'distributor' (Caban) simply does not establish that they agreed to pool their 'efforts.'" *Id.* at 153 (quotation marks in original).

The Third Circuit next determined whether there was enough proof that Shreffler had conspired with Charles Stoner. Stoner was not named in the indictment and had accompanied Shreffler several times to Philadelphia on heroin runs:

Shreffler was one of the people who introduced Stoner to Caban, and the latter later became a major source of supply for the former. Shreffler essentially lived with Stoner for four or five months. During that time, both Shreffler and Stoner sold heroin out of Stoner's home, and people would call seven or eight times a day about purchasing heroin. Stoner obtained some of his heroin from Shreffler, and would sometimes sell heroin to those who came to his house looking for Shreffler when the latter was not present.

*Id.* at 154 (quotation marks omitted). The court noted that "Shreffler and Stoner lived together for several months, and both of them sold drugs out of their shared residence on a daily

basis." *Id.* The court further took stock of the fact that "Stoner would sometimes supply drugs to customers when Shreffler was not available to do so." *Id.* at 155. In the court's view, however, "standing alone, all that this evidence proved was that Shreffler and Stoner were drug dealers who lived together for a time; it would not . . . be enough to show the existence of an agreement between them." *Id.* The court reasoned that "there was no testimony that Shreffler or Stoner ever served as a lookout for the other"; "there was no evidence of . . . conversations [about setting a sales price] between Shreffler and Stoner"; and there was no evidence that they spoke in code or offered to provide physical protection for each other.

The *Pressler* Court highlighted the fact that "[t]he only direct evidence of an agreement between Shreffler and Stoner was a single sentence in James Walker's testimony." *Id.* Walker testified that "Stoner 'would sell for Scott when Scott wasn't around.'" *Id.* (quotation marks in original). The Third Circuit concluded that that testimony alone was insufficient because "it is unclear what Walker meant by the critical statement or the basis upon which he made it." *Id.* at 156. Thus, [b]ecause the Government never demonstrated the existence of an agreement between Shreffler and at least one other person," *id.*, the court vacated Shreffler's conspiracy conviction.

In *United States v. Obialo*, Sunday Obialo was convicted of conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846. The evidence at trial showed that he moved into an apartment in Philadelphia in 1992 and began discussing with his neighbor, Jeffrey Bahamonde, the possibility of distributing heroin. Bahamonde, unbeknownst to Obialo, was a police informant. Obialo gave Bahamonde a matchbook of brown heroin to show to a prospective client and later showed him a large amount of heroin wrapped in a plastic sheet. A few months later, police officers executed a search warrant at Obialo's home and found heroin tying him to the home of his uncle, Patrick Nweze. The officers next went to Nweze's home, where Nweze consented to a search. The officers found large quantities of heroin in Nweze's home. Obialo and Nweze were both charged with and convicted of conspiracy. The district court granted Nweze's motion for a judgment of acquittal. Obialo also moved for Rule 29 relief, arguing that he could not have conspired with anyone in light of the vacatur of Nweze's conviction. The district court denied the motion because the indictment alleged that Obialo conspired with unknown persons.

The Third Circuit reversed. The court recognized that "[t]he failure of the government to be able to name and personally identify the other conspirator is not fatal to a

conspiracy conviction." *Obialo*, 23 F.3d at 72 (citation omitted).

The court then reviewed two of its precedents in which it had found sufficient evidence to support the inference that the defendant had formed an agreement with an unknown third party.<sup>7</sup>

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<sup>7</sup> The Third Circuit discussed its decisions in *United States v. Allen*, 613 F.2d 1248 (3d Cir. 1980), and *Government of Virgin Islands v. Hoheb*, 777 F.2d 138 (3d Cir. 1985). In *Allen*, the court affirmed Allen's drug-trafficking conspiracy conviction where, although his co-defendant was acquitted, Allen

left a message with his answering service with detailed instructions for a third person using the name "Stewart;" that "Stewart" retrieved Allen's message; that he proceeded to a motel directed by Allen's message; that a call was made to Allen's answering service from that motel leaving a message with the room number; that someone came to the hotel and asked for that room; that a truck in the parking lot was listed in the motel records as belonging to that room; and that Allen was arrested the next day in possession of the keys to the truck which contained the marijuana.

*Obialo*, 23 F.3d at 72 (citing *Allen*, 613 F.2d at 1253). In *Hoheb*, the Third Circuit affirmed Hoheb's drug conspiracy conviction even though his co-defendant, Parrilla, was acquitted where

Hoheb had drafted a timetable detailing the transfer at sea of the drugs which included not only Parrilla but also another person. Moreover, Hoheb repeatedly referred to the involvement of a third person in his conversations with the confidential informant, even naming that person the day before the transfer was to take place, and Parrilla also had made statements that referred to the involvement of his friend. This was sufficient to permit the jury reasonably to infer that there was an agreement with a third person, albeit unidentified.

*Id.* at 72-73.

The court contrasted those cases with the evidence adduced against Obialo, finding that "the government presented no evidence to support the inference that Obialo conspired with anyone." *Id.* (emphasis in original) (footnote omitted). The court considered and rejected the government's efforts to show the existence of a conspiracy, finding that all such efforts were "based on sheer speculation":

The government argues that Obialo's statement to Bahamonde that he could retrieve a large quantity of heroin within two hours from New York demonstrated the existence of a conspirator in New York. That statement alone does not support a reasonable inference of an involved other person. . . . Even if Obialo did have to go to New York, there is no reason to assume he would acquire the drugs from another person as distinguished from his own stockpile.

. . . .

Nor is there any evidence from which the jury could reasonably conclude that Obialo had an agreement with importers who posed as students based on his statement to Bahamonde that "they" imported heroin that way. Obialo said nothing from which Bahamonde or the jury could conclude that he had such an agreement, and thus he made no admissions such as supported the finding of a conspiracy in Hoheb.

. . . .

Finally, the government argues that the jury could find the existence of a conspirator from the sheer amount of heroin . . . that Obialo possessed and his financial problems, leading to the inference that Obialo had purchased the heroin on credit. Although the amount of drugs has been held to be a basis on which the factfinder can infer intent to distribute, the substantial amount of heroin that Obialo possessed is not sufficient, either by itself or in conjunction with

the other evidence noted by the government, to support the inference of conspiracy.

*Id.* at 73.

While the authority cited above admittedly addresses drug conspiracies, the need for proof of an agreement is an essential element of every conspiracy. *See, e.g., United States v. Davis*, 965 F.2d 804, 813 (10th Cir. 1992) (reversing a conviction for conspiracy to use interstate commerce to facilitate the bribery of a public official where there was "insufficient evidence of a conspiratorial agreement" between the defendant and some other person); *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988) (finding insufficient evidence of a § 371 mail fraud conspiracy where the government's best evidence showed only the defendants' presence at a meeting and because, "[w]hile the evidence clearly shows that the law was violated, there is insufficient evidence of a common agreement. Without evidence showing or tending to show a meeting of the minds to commit an unlawful act, the convictions cannot stand").

Here, as in the cases cited above, the government has failed to show any integration of activities between Tyson and any other individual that could indirectly prove the existence of a preconceived plan or common understanding to traffic firearms. The government did not, for instance, introduce any communications between Tyson and anyone else about a plan to sell

firearms. The government also failed to present any evidence of Tyson planning to sell, attempting to sell or actually selling firearms as part of an agreement with some other individual. To the extent the government relies on Tyson's statement to airline personnel -- that "he was an antique gun buyer and collector, and that he had a purchaser for all of the guns when he got back to the islands," (Trial Tr. vol. 1, 227-28) -- that statement, at best, is aspirational and self-laudatory. Significantly, it does not demonstrate the existence of an agreement with someone else to sell or traffic in firearms. *Cf. United States v. Allah*, 130 F.3d 33, 46 (2d Cir. 1997) (concluding that there was sufficient evidence of an agreement where, among other things, the defendant used the pronoun "we" when describing his and his coconspirator's "inventory and methods of doing business").

For similar reasons, the government also cannot rely on testimony about a firearm Tyson purchased in Tennessee that was later found in St. Thomas in the possession of an individual who had some time earlier wired money into an account held by Tyson. That evidence, like Tyson's statements to airline personnel, indicates that Tyson may have sold a firearm. However, to the extent that testimony highlights only unilateral conduct by Tyson, it cannot serve to establish the existence of an agreement with some other person to sell firearms.

The government adduced evidence that Tyson, Morrell and Sherry Wagner were found together in a house in Tennessee where firearms and related paraphernalia were discovered. The government also demonstrated that Tyson, Morrell and Wagner went together to a shooting range in Tennessee where they engaged in target practice. To the extent the government relies on that evidence to show the existence of an agreement between Tyson and either Morrell or Wagner, or both, such reliance is misplaced. It is axiomatic that a defendant's mere presence does not suffice to show that he agreed with at least one other person to commit an unlawful act. *See, e.g., United States v. Rodriguez-Valdez*, 209 Fed. Appx. 178, 180-81 (3d Cir. 2006) (unpublished) (reversing a conviction for conspiracy to possess with intent to distribute cocaine where the defendant was found on a boat suspected of drug-trafficking because his "presence on the boat is . . . too slender a reed upon which to base a finding that he was aware . . . that drugs, as opposed to some other form of contraband, were involved"). Indeed, unlike *Rodriguez-Valdez*, where "the jury undeniably could have concluded that [the defendant's] presence on the boat signaled an understanding that he was engaged in an illicit transaction," *id.* at 181, here, the government did not even present any evidence whatever that Tyson was involved in some illicit activity.

The other evidence the government proffered shows that Tyson purchased approximately thirty-five firearms over a several-month-long period. He made some of those purchases alone. On other occasions, he may have been accompanied. The problem for the government is that Tyson's purchases of firearms are neither unlawful on their own nor supportive of the existence of a conspiracy when viewed in conjunction with the other evidence in this case. *Cf. Allah*, 130 F.3d at 45 ("The evidence that Hamilton was aware that his conduct was illegal included his acting as a lookout for that first gun sale -- during which there was a shouted alarm that the police were in the area -- and his subsequent refusal to ride with Rosado while Rosado was transporting the just-purchased guns."). Moreover, to the extent those purchases could be taken to suggest the existence of an agreement to buy firearms and to do something with them, there is insufficient evidence in the record from which to infer that that something was selling those firearms for profit, as alleged in the indictment.

No rational jury could have inferred that Tyson entered into the necessary conspiratorial agreement with some other person based on his purchases of firearms and travels to St. Thomas as well as his conversations with airline personnel. Accordingly, the Court will grant Tyson's motion as it pertains to Count One.

**B. Counts Two through Thirteen: Trafficking Firearms in Interstate and Foreign Commerce**

Counts Two through Thirteen of the indictment charged Tyson with trafficking firearms in interstate and foreign commerce in violation of 18 U.S.C. § 922(a)(1)(A).<sup>8</sup> To prove as much, the government had to show that Tyson (1) engaged in the business of dealing in firearms; (2) was not then a federally licensed firearms dealer; and (3) acted willfully. See 18 U.S.C. § 922(a)(1)(A); *United States v. Sanchez-Corcino*, 85 F.3d 549, 554 (11th Cir. 1996).

Here, the evidence adduced at trial sufficiently establishes that Tyson was not a federally licensed firearms dealer. Penny Stricklin, an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), testified about a certified document from the Federal Firearms Licensing Center. According to Stricklin, that document indicated that Tyson "does not have a federal firearms license." (Trial Tr. vol. 2, 279.)

The problem for the government is the first element of a § 922(a)(1)(A) offense. When Congress enacted the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223 (1968), it did not define "engaged in the business of dealing in firearms." See *United States v. Breier*, 813 F.2d 212, 213 (9th Cir. 1987); see

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<sup>8</sup> Counts Two through Thirteen each charged Tyson with trafficking a different, specific firearm.

also *Bryan v. United States*, 524 U.S. 185, 186 (1998) ("The 1968 Act . . . omitted any definition of the term 'engaged in the business' even though that conduct was an element of the unlawful act prohibited by § 922(a)(1)."); *United States v. Day*, 476 F.2d 562, 567 (6th Cir. 1973) ("There is no statutory standard defining 'engaged in business.'"); *United States v. Zeidman*, 444 F.2d 1051, 1055 (7th Cir. 1971) ("The statute does not prescribe any standards for determining when a person is 'engaged in the business.'"). That definitional gap opened the door to judicial interpretation. See *Breier*, 813 F.2d at 213, 216 ("Courts have fashioned their own definitions of the term. . . . Congress was well aware of the judicial interpretations of the term 'engaged in the business.' (footnote omitted)); *United States v. Schumann*, 861 F.2d 1234, 1237 n.2 (11th Cir. 1988) ("[T]he term 'engaged in the business' as it relate[s] to the sale of firearms [is] subject to judicial interpretation." (citations omitted)); see also, e.g., *United States v. Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981); *United States v. Swinton*, 521 F.2d 1255, 1258 (10th Cir. 1975) ("This Court has not heretofore considered the scope of the language 'engaged in the business of dealing in firearms.'"); *Day*, 476 F.2d at 567 (defining the phrase based on case law).

In 1986, the Firearms Owners' Protection Act, Pub. L. No.

99-308, § 101, 100 Stat. 449, 450 (1986), was signed into law. Among other things, it amended the Gun Control Act of 1968 by adding a definition of "engaged in the business of dealing in firearms." The new definition has effectively raised the evidentiary bar for the government by restricting the definition of what constitutes a firearms dealer and "engaged in the business". See *Martin v. United States*, 989 F.2d 271, 274 n.4 (8th Cir. 1993) (noting that the 1986 amendment has "narrow[ed] the class of persons for whom certain conduct is prohibited" (emphasis supplied)); *Schumann*, 861 F.2d at 1237 (noting that the 1986 amendment "substituted, inter alia, a narrower definition of 'dealer' by further defining the term 'engaged in the business'" (emphasis supplied)); *Breier*, 813 F.2d at 216 (stating that Congress "enacted new §§ 921(a)(21) and 921(a)(22) in order to limit the conduct deemed to be criminal" (emphasis supplied)).

Under the 1986 amendment, to be "engaged in the business of dealing in firearms" means to devote "time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms[.]" 18 U.S.C. § 921(a)(21)(C). "In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the

acts alleged to constitute engaging in business." *United States v. Palmieri*, 21 F.3d 1265, 1268 (3d Cir. 1994), vacated on other grounds, 513 U.S. 957 (1994). "This inquiry is not limited to the number of weapons sold or the timing of the sales." *Id.* "For example, the location of the sales, the time and conditions under which the sales occur, the defendant's behavior before, during and after the sales, the price charged for and characteristics of the firearms sold, and the intent of the seller are all potentially relevant indicators of whether one has 'engaged in the business' of dealing." *Id.* at 1268. A person does not "engage in the business of dealing" if he "makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or . . . sells all or part of his personal collection of firearms." 18 U.S.C. § 921(a)(21)(C); *Bryan*, 524 U.S. at 188 n.5.

As noted above, under the 1986 amendment to § 922(a)(1)(A), a defendant's activity is criminal under that statute if his purchase and resale of firearms: (1) is repetitive; (2) constitutes a regular course of trade or business; and (3) is done with the principal objective of livelihood and profit. See 18 U.S.C. § 921(a)(21)(C). The Court does not believe that the evidence adduced at trial, viewed in a light most favorable to the government, satisfies those essential elements. After an

intensive review of the record, the Court has pinpointed several types of evidence that only tenuously suggest that Tyson engaged in firearm sales for profit.

First, the government introduced unrefuted evidence that Tyson purchased several firearms from various federally licensed firearms dealers in Tennessee. The government coupled that evidence with the testimony of Adam Eric Moore, an assistant vice president and compliance officer with First Bank & Trust. Moore testified that Tyson had three joint bank accounts at that bank with Sherry Wagner. Moore also testified about fluctuations not exceeding several hundred dollars in the balances of those accounts over a several-month period. Those fluctuations included occasional overdrafts. (Trial Tr. vol. 2, 90-93.)

Second, Tyson made several trips over several months from Tennessee to St. Thomas. (*Id.* at vol. 1, 168-72.) Before embarking on one of those trips, on July 31, 2008, Tyson was found to have firearms in his suitcase. (*Id.* at vol. 2, 51-52.) He boarded a St. Thomas-bound plane. On arrival, he entered a car that police stopped shortly thereafter. Tyson was subsequently taken into custody.

Dudley Breeding, an airline ticket agent at the Tri-Cities Airport in Tennessee, testified that she processed Tyson's airline tickets on four separate occasions. According to

Breeding, on more than one of those occasions Tyson was traveling with firearms. Breeding testified that Tyson, before boarding a flight to St. Thomas on July 31, 2008, told her that "he was an antique gun buyer and collector, and that he had a purchaser for all of the guns when he got back to the islands." (*Id.* at vol. 1, 227-28.) Stricklin, the ATF agent, testified that Tyson, upon landing on St. Thomas after that flight, was found with at least nine firearms in his luggage. (*Id.* at vol. 2, 313.) Breeding additionally testified that "[e]very time [Tyson] flew, that I was on duty, we always had a very nice discussion, and that he, he was bringing the guns back, either collecting them or had a buyer for them." (*Id.* at vol. 1, 228.)

Finally, the government introduced a notepad obtained from the Tennessee residence in which Tennessee police officers found Tyson, Morrell and Sherry Wagner after responding to a 911 call. Jamie Jenkins, an ATF special agent, testified that the notepad contained lists of firearms and their calibers with corresponding dollar amounts.<sup>9</sup> (*Id.* at vol. 1, 155-56.)

All of the evidence outlined above, taken together, perhaps may have been sufficient to find Tyson guilty of violating § 922(a)(1)(A) before the 1986 amendment circumscribed the

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<sup>9</sup> The notations that Jenkins indicated were dollar amounts are standalone numerical figures, unaccompanied by currency signs.

definition of "engaged in the business." Tyson, however, was not charged pre-1986. The government was therefore obligated to prove the statutory elements set forth at § 921(a)(21)(C). In the Court's view, the government fell short of that obligation. The government did not, for instance, establish that Tyson's purchases of firearms constituted "a regular course of trade or business." Indeed, apart from showing that Tyson was a National Guardsman, the government failed to introduce any evidence of Tyson's business or income-generating activities of any kind. There is, in other words, no frame of reference within which to infer that Tyson's firearms purchases constituted a course of trade or business, regular or otherwise.

The government similarly did not present any evidence that Tyson's firearms purchases and travels to the Virgin Islands were carried out "with the principal objective of livelihood and profit." Indeed, post-1986 amendment courts have reversed § 922(a)(1)(A) convictions in the absence of proof that a defendant's firearms sales were for profit. *See, e.g., United States v. Hyde*, No. 95-10156, 1996 U.S. App. LEXIS 4679, at \*3 (9th Cir. Feb. 29, 1996) (unpublished) ("The government failed to demonstrate that the firearms were sold or disposed of with a profit motive. It only submitted evidence of clandestine activity, opportunity, and financial incentive. . . . But not

even strong suspicions and informed speculations are quite enough. We are constrained to hold that no rational trier of fact could have found beyond a reasonable doubt that Hyde dealt in firearms.").

Finally, and perhaps most critically, the government failed to provide sufficient evidence that Tyson actually sold firearms and did so repetitively, as required by § 921(a)(21)(C). While a reasonable jury perhaps could have inferred that Tyson was transporting firearms to the Virgin Islands to sell them, the Court does not believe that Tyson's passing statements to an airline employee about having a firearms buyer in the Virgin Islands sufficiently establishes that he made repetitive firearms sales, as the government was statutorily bound to prove. Those statements, without proof that Tyson actually sold firearms for profit, essentially amount to mere puffery that, standing alone, cannot sustain his conviction.<sup>10</sup> See, e.g., *United States v. Scofield*, 433 F.3d 580, 586 & n.4 (8th Cir. 2006) (directing the district court to enter a judgment of acquittal with respect to

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<sup>10</sup> The Court also does not find that relatively minor ups and downs in Tyson's personal finances are sufficient to show that he engaged in the business of dealing firearms as that phrase is statutorily defined. To conclude that those fluctuations were the result of illegal firearms purchases and sales, without more, as opposed to legitimate income-generating activities and expenditures, would be to engage in pure speculation.

the defendant's conviction for possession with intent to distribute methamphetamine where, among other things, the defendant stated on an occasion that he was an "importer" of methamphetamine, because that statement "was puffery in the context of the overwhelming lack of evidence").

This is also not a case in which Tyson's statements amount to attempted trafficking in firearms in violation of § 922(a)(1)(A). *Cf.*, e.g., *United States v. Uca*, 867 F.2d 783 (3d Cir. 1989). "Under federal law, attempt requires intent and conduct amounting to a substantial step towards the commission of the crime." *United States v. Ledesma-Cuesta*, 347 F.3d 527, 531 (3d Cir. 2003) (emphasis supplied) (quotation marks and citation omitted); see also *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006).

Here, even if the evidence were sufficient for a reasonable jury to conclude that Tyson intended to sell firearms to a buyer in the Virgin Islands and took the step of shipping those firearms here for that purpose, there is insufficient evidence that his conduct rose to the level of "engaging in the business of dealing in firearms." The government's evidence on this point seems scant indeed when juxtaposed with the far more robust evidence described in decisions affirming § 922(a)(1)(A) convictions. See, e.g., *Bryan*, 524 U.S. at 189; *United States v.*

*White*, 175 Fed. Appx. 941, 942 (9th Cir. 2006) (unpublished); *United States v. Orum*, 106 Fed. Appx. 972, 974 (6th Cir. 2004) (unpublished); *United States v. Kubowski*, 85 Fed. Appx. 686, 687 (10th Cir. 2003) (unpublished); *United States v. Fridley*, 43 Fed. Appx. 830, 833 (6th Cir. 2002) (unpublished); *United States v. Dettra*, No. 99-3667, 2000 U.S. App. LEXIS 33715, \*6-7 (6th Cir. Dec. 15, 2000) (unpublished); *Allah*, 130 F.3d at 45-46; *United States v. Beecham*, Nos. 92-5147 & 92-5399, 1993 U.S. App. LEXIS 13050, at \*8 (4th Cir. June 2, 1993) (unpublished); *United States v. Murphy*, 852 F.2d 1, 8 (1st Cir. 1988).

In light of the record's evidentiary paucity on this point, the Court will grant Tyson's motion as it pertains to Counts Two through Thirteen.<sup>11</sup>

**C. Counts Fourteen through Twenty-Four: Unauthorized Possession of a Firearm**

In Counts Fourteen through Twenty-Four, the government charged Tyson with unauthorized possession of various firearms in violation of V.I. CODE ANN. tit. 14, § 2253(a), which provides:

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<sup>11</sup> In its order for supplemental briefing, the Court ordered the government to "cite to specific portions of the trial transcript, and to relevant legal authority where appropriate, to show that each element of each count on which Tyson was found guilty is supported by sufficient evidence." (Order, Apr. 28, 2009.) In response, the government recited some of the basic facts regarding Tyson's purchase of firearms in Tennessee and Tyson's travels from Tennessee to St. Thomas. Importantly, the government elected not to underscore a single page of trial transcript regarding Tyson's sales of firearms for profit.

Whoever, unless otherwise authorized by law, has, possesses, bears, transports or carries either, actually or constructively, openly or concealed any firearm, . . . loaded or unloaded, may be arrested without a warrant, and shall be sentenced to imprisonment . . . .

Thus, to prove that Tyson was guilty of that offense, the government had to show that (1) Tyson knowingly possessed, carried or transported a firearm; (2) Tyson was not licensed or otherwise authorized to possess the firearm; and (3) the firearm was operable. *See Hunt v. Virgin Islands*, 46 V.I. 534, 539 (D.V.I. App. Div. 2005); *United States v. Blyden*, 740 F. Supp. 376, 380 (D.V.I. 1990); *Virgin Islands v. Albert*, 18 V.I. 21, 24 (D.V.I. 1980).

Here, the government marshaled sufficient evidence to sustain each element of Tyson's § 2253(a) convictions. Penny Stricklin, the ATF agent, testified about eleven firearms that were discovered in Tyson's luggage after he arrived in St. Thomas. (See generally Trial Tr. vol. 2, 285-91.) Those eleven firearms correspond to the firearms listed in Counts Fourteen through Twenty-Three.<sup>12</sup> Stricklin's testimony in this vein is sufficient to conclude that Tyson possessed those firearms.

The government also proved that Tyson was not authorized under Virgin Islands law to possess firearms. Karen Stout, the

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<sup>12</sup> The jury found Tyson not guilty of Count Twenty-Four.

supervisor of the VIPD's Firearms Bureau for the District of St. Croix, testified that Tyson "never applied for a license to possess or carry a firearm in the District of St. Croix." (*Id.* at vol. 2, 265.) Elfreda Robinson, Stout's counterpart for the District of St. Thomas/St. John/Water Island, testified that Tyson never registered a firearm with the VIPD and is not licensed to possess a firearm in the Virgin Islands. (*Id.* at vol. 2, 269.)

Finally, Jay Quabius, an ATF special agent, testified that he tested the various firearms listed in Counts Fourteen through Twenty-Four. According to his testimony, ten out of the eleven firearms listed in those counts were operable. (*Id.* at vol. 2, 360-64.) Only the firearm indicated in Count Twenty-Four was inoperable. (*Id.* at vol. 2, 363.)

Based on the evidence outlined above, the Court concludes that the government met its burden of proving beyond a reasonable doubt that Tyson violated § 2253(a) with respects to Counts Fourteen through Twenty-Three. The Court will therefore deny his motion with respect to those counts.<sup>13</sup>

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<sup>13</sup> Tyson fleetingly argues that he "was never given the opportunity to comply with the registration that was required." (Def. Tyson's Mem. Supp. Rule 29 at 4.) In essence, Tyson asserts that because he was arrested shortly after his arrival in the Virgin Islands, he was precluded from complying with V.I. CODE ANN. tit. 23, § 470(b). That may be so. However, that claim, at best, raises an affirmative defense, which a defendant

**D. Count Twenty-Five: Transferring a Firearm to be Used in a Crime**

In Count Twenty-Five, Tyson was charged with transferring a firearm to be used in a crime in violation of 18 U.S.C. § 924(b), which provides:

Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

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must prove. *United States v. McKie*, 112 F.3d 626, 631 (3d Cir. 1997). Tyson did in fact raise that defense and placed it squarely before the jury:

Now, there was a lot of talk, a lot of talk, with regards to failing to register. And then we found out, well, you know, the law says you may do two things, immediately or in writing. . . . I am asking one fundamental question. If you start off on the right foot by doing what is required, how could you ever end up in a position like this? Because you were prevented, you were arrested on the airport road. You were never taken in from the airport road, never taken to the Police Station and says: Listen, register them here. We are here with you. They never give him that opportunity, even though he started out on that road, to . . . declare these weapons. Is that not a doubt? Is that not a doubt based on reason and common sense, that would make you hesitate in the most important of your functions in this life that you live?

(Trial Tr. vol. 3, 108-09, Jan. 16, 2009.) The jury was apparently unswayed by this argument. In any event, Tyson's noncompliance with § 470 does not signify the government's failure to prove his § 2253(a) convictions.

The indictment states that the "offense punishable by imprisonment for a term exceeding one year" in this case is unauthorized possession of a firearm in violation of V.I. CODE ANN. tit. 14, § 2253(a). A conviction for that offense mandates a prison term of not less than one year. *Id.* To prove that Tyson was guilty of the offense charged in Count Twenty-Five, the government had to show that Tyson (1) knowingly shipped, transported, or received a firearm or ammunition in interstate or foreign commerce; and (2) intended to commit the offense of unauthorized possession of a firearm or had knowledge or reasonable cause to believe that the unauthorized possession of a firearm was to be committed by another person. See *United States v. Khan*, 309 F. Supp. 2d 789, 819 (E.D. Va. 2004), *rev'd on other grounds*, 461 F.3d 477 (4th Cir. 2006).

At trial, the government proved beyond a reasonable doubt that Tyson transported several firearms in interstate commerce. The record abounds with testimony from airline employees and law enforcement officials that Tyson boarded an airplane in Tennessee with firearms and arrived in the Virgin Islands with those firearms in tow. See 18 U.S.C. § 921(a)(2) (stating that interstate commerce "includes commerce between any place in a State and any place outside of that State, or within any possession of the United States" and that "[t]he term 'State'

includes possessions of the United States"); *United States v. Hyde*, 37 F.3d 116, 121 (3d Cir. 1994) (noting that the Virgin Islands is a United States possession).

The Court has little confidence, however, that the government met its burden with respect to the second element of a § 924(b) offense. That element essentially delineates two ways a defendant may violate § 924(b), assuming § 2253(a) is the predicate offense. First, a defendant may violate § 924(b) if he transports a firearm in interstate commerce with the intent to possess that firearm without authorization. Second, a defendant may violate § 924(b) if he transports a firearm in interstate commerce and knows or has reasonable cause to believe that another person will possess it without authorization.

Here, as discussed above, the government presented evidence of Tyson's various firearms purchases and travels from Tennessee to the Virgin Islands with firearms. In addition, Karen Stout and Elfreda Robinson, the VIPD officers, testified that Tyson was not licensed to possess a firearm in the Virgin Islands and that the firearms found in Tyson's luggage were not registered in the Virgin Islands. Various other law enforcement officials testified that Tyson was arrested alongside Morrell and Thomas after arriving in St. Thomas with firearms. The record also includes testimony that before July 31, 2008 Tyson traveled from

Tennessee to St. Thomas with firearms, none of which was registered with Virgin Islands authorities and most of which have not been found.

Based on this evidence, the government "submits it was reasonable for the jury to infer . . . that [Tyson] knew, or had reasonable cause to believe that the firearms he brought illegally into the Virgin Islands would not be registered. (Pl.'s Rule 29 Supp. Br. 5.) The government contends that "[t]his rationale is based upon his prior conduct after his arrival in St. Thomas, by failing to register the weapons and transporting them to other people, and that by obliterating the serial number on the weapons<sup>14</sup>, it would eliminate any evidence linking him as the purchaser of the weapons. (*Id.*) The government has nothing else to say on Count Twenty-Five. The Court is unconvinced.<sup>15</sup>

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<sup>14</sup> As noted earlier, the government adduced evidence that a firearm Tyson purchased in Tennessee was found in St. Thomas in the possession of Jelanie LaTorre and that LaTorre had previously wired money to Tyson. That firearm had an obliterated serial number. The government's reliance on this testimony to support Tyson's § 924(b) conviction is unavailing. While there may be suspicion and speculation that Tyson transported a firearm to obliterate its serial number, there was no evidence offered that Tyson transported that firearm for that purpose. A firearm with an obliterated serial number in the hands of a person, standing alone, is not sufficient proof that another person was the source for the uncorrupted firearm and transported it with knowledge that its serial number would be obliterated.

<sup>15</sup> The Court notes that only a handful of federal cases address § 924(b) in the Rule 29 context. Those cases either do not have full discussions of the prosecution's evidence or are

The evidence on which the government relies is insufficient to show that Tyson violated § 924(b) by transporting a firearm with the intent to commit the crime of unauthorized possession of a firearm. The mental jujitsu required to understand the government's theory strains logic. Indeed, the government suggests that Tyson legally possessed a firearm, only to knowingly ship it to himself with the intent of again possessing it without authorization. In the Court's view, it is difficult to imagine how any intent on Tyson's part to violate the predicate crime alleged here could be inferred. Tyson was arrested almost immediately upon arrival in St. Thomas. He was therefore given no opportunity to evince an intent to commit that offense. That circumstance, as noted earlier, may not be germane to Tyson's § 2253(a) conviction. *Cf. United States v. McKie*, 112 F.3d 626, 630 (3d Cir. 1997) ("[W]e hold § 470 is not an element of the offense of unlawful firearm possession under V.I. CODE ANN. tit. 14, § 2253, but rather is an affirmative defense."). It certainly assumes importance, however, in the context of his § 924(b) conviction where, as here, proof of an intent to violate § 2253(a) is required. In essence, the government asked the jury to infer "intent on intent" and now asks the Court to locate evidence of this double-layered intent in the record. After an

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factually inapposite.

exhaustive review, the Court sees no record evidence -- and the government has pointed to none -- based on which such intent may be inferred. *Cf. United States v. Krug*, 20 Fed. Appx. 271, 276-77 (6th Cir. 2001) (unpublished) (affirming a § 924(b) with a predicate offense of murder where the government presented evidence that the defendant was found with a file on the would-be victim, pictures of his house, directions to his house, maps surrounding his house, as well as a to-do list in which the defendant had made a notation about killing the victim).

There is also insufficient evidence that Tyson knew or had reasonable cause to believe that another person would commit the crime of unauthorized possession of a firearm Tyson provided. True, the government adduced evidence that Tyson transported firearms from Tennessee to the Virgin Islands. There is absolutely no evidence, however, that Tyson knew or had reasonable cause to believe either that anyone to whom he transferred those firearms was unauthorized to possess a firearm under Virgin Islands law or that those firearms were not properly registered in accordance with Virgin Islands law. Again, despite the Court's invitation, the government chose not to spotlight any portion of the record to compel a contrary conclusion.

Viewing the evidence in the light most favorable to the government, no rational trier of fact could have found proof

beyond a reasonable doubt that Tyson violated § 924(b). The Court therefore will grant the motion with respect to Count Twenty-Five.

**E. Count Twenty-Six: Transferring Firearms to an Out-of-State Resident**

Count Twenty-Six charged Tyson with transferring firearms to an out-of-state resident in violation of 18 U.S.C. § 922(a)(5). That offense required the government to prove that (1) Tyson willfully transferred, transported or delivered a firearm to another person; (2) neither Tyson nor the person to whom the firearm was transferred was licensed as a firearms importer, manufacturer, dealer, or collector at the time of such transfer; and (3) Tyson knew or had reasonable cause to believe that the person to whom the firearm was transferred was not a resident of the same State in which the defendant resided. To have "reasonable cause to believe" that someone is a resident of another state means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts to reasonably conclude that such other person was a resident of another state.

In *United States v. Hayden*, 64 F.3d 126 (3d Cir. 1995), the defendant was charged with violating 18 U.S.C. § 922(n).<sup>16</sup> §

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<sup>16</sup> 18 U.S.C. § 922(n) provides as follows:

922(n), like § 922(a)(5), has a corresponding penalty provision codified at 18 U.S.C. § 924(a)(1)(D), which provides:

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in the section 929, whoever --

(D) willfully violates any other provision of this chapter, shall be fined not more than \$5,000, imprisoned not more than five years, or both.

In *Hayden*, the Third Circuit reviewed the legislative history and the statutory context in which the word "willfully" appears in the above provision. The court explained that "[i]n defining 'knowingly,' courts have almost uniformly rejected arguments that the term requires the defendant know his conduct was unlawful; rather, they have interpreted 'knowingly' merely to require that the defendant know he was engaging in the prohibited conduct." *Hayden*, 64 F.3d at 130 (listing cases). The court concluded, in light of the legislative history it had examined, that "it is difficult to understand what more the 'willfully' language could require, if not knowledge of the law." *Id.* (citation omitted). Accordingly, the Third Circuit held that "because of the legislative history and the context in which

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It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

'willfully' and 'knowingly' were added simultaneously to different provisions of the same statutory subsection, . . . 'willfully' in § 924(a)(1)(D) means the defendant must have acted with knowledge that his conduct was unlawful." *Id.* (emphasis supplied).

Other federal courts of appeals have similarly interpreted § 924(a)(1)(D) to mean that a defendant may be convicted of violating § 922(a), including § 922(a)(5) in particular, only if the government proves that the defendant had actual knowledge of the law he is charged with violating. *See United States v. Rodriguez*, 132 F.3d 208, 211 (5th Cir. 1997) ("Thus, we find that knowledge of the law is required for a conviction under §§ 922(a)(5) and 924(a)(1)(D)."); *United States v. Sanchez-Corcino*, 85 F.3d 549, 553-54 (11th Cir. 1996) ("Accordingly, we too conclude that in order for the Government to prove the offense of willfully dealing in firearms without a license under §§ 922(a)(1)(A) and 924(a)(1)(D), it must prove that the defendant acted with knowledge of the licensing requirement."); *United States v. Obiechie*, 38 F.3d 309, 315-16 (7th Cir. 1994) ("In our view, the only reasonable distinction between section 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law."); *United States v. Hern*, 926 F.2d 764, 767 & n.6 (8th Cir. 1991) ("'[W]illful' means an intentional

violation of a known legal duty."); but see *United States v. Andrade*, 135 F.3d 104, 110 (1st Cir. 1998) ("Admittedly, two other circuits say that conviction requires proof that the defendant was aware of the licensing requirement itself, but we do not find these cases persuasive." (citations omitted)); *Allah*, 130 F.3d at 39-40.<sup>17</sup>

Here, the government failed to present any direct evidence to show that Tyson knew that he was subject to a licensing scheme. The absence of such evidence, on its own, does not lead inexorably to an insufficiency finding, as circumstantial evidence of Tyson's knowledge may also support his conviction on this count. See *Rodriguez*, 132 F.3d at 212. The Court, however, has unearthed no such evidence in the record. Indeed, the record shows that on several occasions Tyson freely and openly declared his possession and transportation of firearms to airline personnel and law enforcement authorities. In sum, there is simply no evidence that Tyson knew he was violating § 922(a)(5). See, e.g., *Hayden*, 64 F.3d at 134 (vacating a § 922(n) conviction where the district court precluded the defendant from showing that he did not have knowledge that he was violating § 922(n))

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<sup>17</sup> Although there does not appear to be any Third Circuit precedent directly on point, the weight of authority clearly indicates that a § 922(a)(5) conviction may stand only if the government proves that the defendant actually knew of the law he is charged with violating.

because such evidence is an element of that offense); *cf.* *Rodriguez*, 132 F.3d at 212 (upholding a § 922(a)(5) conviction based on circumstantial evidence to permit the jury to infer that the defendant had knowledge of the law where the defendant "knew that there was generally something illegal going on at the Burger King that day, for on the way to the restaurant she stated her concerns about the nature of the transaction and expressed a desire to abort it").

Accordingly, because the government failed to prove an essential element of a § 922(a)(5) offense, Tyson's conviction on Count Twenty-Six must be vacated.

#### **IV. CONCLUSION**

The Court is well aware of the statutory framework that seeks to arrest illegal firearms trafficking. In assessing whether the government has adduced sufficient evidence to prove that a defendant has run afoul of the relevant firearms statutes, the Court must juxtapose the defendant's conduct with the subject statute. Undertaking that exercise with respect to Tyson yields certain elemental conclusions. First, Tyson bought a large volume of firearms in Tennessee. Second, he transported those firearms from Tennessee to the Virgin Islands. Third, there is some possibility that this conduct constitutes evidence of firearms trafficking. That possibility, however, does not

talismanically transform suggestive evidence into legally sufficient evidence. This is especially the case where, as here, there is an absence of proof that satisfies the statutory mandate.

The Court is mindful of the great challenges that arise in the law enforcement arena. Law enforcement agents frequently confront heart-fluttering situations that necessitate on-the-spot decisions. By definition, such decisions are taken without the benefit of full-blown reflection. Understandably, the focus in the first instance is on arresting perceived criminal conduct, not deliberating on whether all of the elements of a particular crime will be provable at trial. The possible downside of this approach is clear: sometimes such urgent arrests stunt the development of the necessary foundation for conviction. The government's prosecution may very well be a casualty of that reality.

The Court does not doubt the government's good intentions in prosecuting Tyson, as his conduct raised an inference that something untoward was afoot. The government's suspicions and good intentions notwithstanding, the federal statutes the government charged Tyson with violating call for more than the

government offered here.<sup>18</sup>

For the reasons given above, Tyson's motion for a judgment of acquittal will be granted in part and denied in part. An appropriate judgment follows.

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

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<sup>18</sup> For example, even an attempt to sell a firearm to a confidential informant or an undercover officer in the Virgin Islands would likely result in this Court sustaining the jury's verdict with respect to the charge of transferring firearms to an out-of-state resident. Yet, no such evidence was ever adduced.